



Mbindyo & another v Mbindyo (Environment and Land Case Civil Suit E045 of 2022) [2025] KEELC 4305 (KLR) (10 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT E045 OF 2022**

AY KOROSS, J

JUNE 10, 2025

BETWEEN

ANTHONY MUYALE MBINDYO 1ST PLAINTIFF

ALFRED JOHNSON MUNYAO MBINDYO 2ND PLAINTIFF

AND

MARY MWONGELI MBINDYO DEFENDANT

RULING

1. This is a ruling in respect of notice of motion dated 20/02/2024 filed by the defendant, where she seeks the following orders from this court: -
 - a. Spent.
 - b. Spent.
 - c. THAT the entire suit herein as commenced vide the plaint dated 21/06/2022 be struck out and dismissed in its entirety.
 - d. THAT the costs of the motion and the entire suit be borne by the plaintiffs.
2. The motion is supported by the grounds set out in the body thereof and the defendant's affidavit sworn on 20/02/2024.
3. A summary of the grounds in support of the motion are that a) That vide the plaint dated 21/06/2022, the plaintiffs are seeking among other reliefs that Mavoko Town Block 3/2XX2 ["suit property"] registered in the defendant's name be declared as being held by her in trust for the plaintiffs and their siblings and it be subdivided to the plaintiffs and the siblings.
4. B) That as such the suit property constitutes the estate of Phillip Mbindyo Mativo ("Deceased"), c) The nature of the claim by the plaintiffs is purely a probate cause, as it purports to deal with deceased's



estate and how the estate is to be divided, which jurisdiction is reserved for the High Court by virtue of the *Law of Succession Act* (LSA).

5. The motion is opposed vide replying affidavit sworn by the 1st defendant on 5/03/2024. Briefly, he stated that, the suit property and the 1 share from Lukenya Ranching Society were registered in the name of the defendant to hold in trust for all the deceased's family members hence cannot be subject of probate proceedings, b) the suit property never formed part of the free property of the deceased as defined by the LSA); and
6. C)By Section 28 (b) of the *Land Registration Act*, this court has jurisdiction to determine rights under customary trusts and lastly, d) the claim on the suit property flows directly from the defendant to the family members of the deceased and the deceased cannot be said to have any proprietary interest on the suit property.
7. In rejoinder, the defendant deposed a further affidavit on 27/03/2024 whereby, in short, she stated amongst others that: a) the plaintiffs are her stepchildren and, through this suit, have deliberately desired to dispossess her, b) a close look at the replying affidavit reveals that it is only signed by the two plaintiffs and does not have the names and signatures of the other family members that the plaintiffs purport to represent, finally, c) in the replying affidavit, the plaintiffs have denied the contents of their claim.
8. Despite court directions, only written submissions were received from the law firm of Ms. Teddy & Company Advocates on record for the defendant, and this court is appreciative to counsel for the well-articulated submissions.
9. Having considered the motion, its grounds, affidavits, and defendant's submissions together with the provisions of law and judicial precedents relied upon, the singular issue for determination is whether this court has jurisdiction to entertain the suit.
10. Regarding this issue, Article 162(2)(b) of *the Constitution*, relevant statutes, and case law clothe this court with the jurisdiction to entertain disputes appertaining to use, occupation and title to land and environment.
11. It is now settled law as established in the decision of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) that once a court finds it does not have jurisdiction to hear and determine a dispute, then it has no choice but to down its tools. This position was underscored by the Supreme Court of Kenya in the decision of Republic v Karisa Chengo & 2 others [2017] eKLR, which stated that:

“John Bercroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.



12. On matters of jurisprudence, the recent Court of Appeal decision of *Diasproperty Limited & 5 others v Githae & 10 others* [2024] KECA 318 (KLR) expressed itself on the intersection between the probate court and this court in the following manner: -

“36. Under Article 165(5)(b) of *the Constitution*, the High Court shall not have any jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court. Under Article 162(2) of *the Constitution* and section 13 of the *Environment and Land Court Act*, 2012, all matters relating to land, its ownership, use, tenure, boundaries, and so on, are reserved for the Environment and Land Court.

37. It is notable that under Rule 43(1) of the Probate and Administration Rules, made under the *Law of Succession Act*, where, in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, or there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate court. It is when such a determination is made that the succession court can confirm the grant, bearing in mind the determination. Of course, with *the Constitution* and the *Environment and Land Court Act*, such a dispute has to be referred to the Environment and Land Court for resolution.”

13. As for jurisdiction on matters dealing with intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto, the probate courts, including the High Court and Magistrates Courts, have statutory jurisdiction to entertain such disputes as envisaged by the LSA.

14. When exercising such jurisdiction, the probate court deals with the free property of a deceased person, which is usually the property that the deceased was legally competent to freely dispose off during his lifetime, and in respect of which his interest had not been terminated by his death. [See the definition from the interpretation section of the LSA.]

15. Having laid the legal framework of jurisdiction, suffice it is to say that the answer to the issue in dispute lies in a determination of whether the suit property was the free estate of the deceased.

16. Concerning this question, this court has scrutinized the record, and it reveals that the suit property, which is a freehold land, was registered in the defendant's name on 10/08/2006 and the defendant enjoyed such rights to it as envisaged under Section 25 of the *Land Registration Act* (LRA) but of course subject to overriding interests as stated in Section 28 of the thereof. Thus, it follows that the suit property is removed from the purview of the jurisdiction of the probate as it was not the free property of the deceased.

17. Furthermore, by Section 28 (b) of the LRA, trusts, including customary trusts, are overriding interests that are not noted in the register and may, for the time being, subsist and affect the land. The plaintiffs' plaint dated 21/06/2022 confirms their claim against the defendant falls within the ambit of this court as they are seeking the relief of a declaration that the suit property is held in trust for them.

18. The jurisprudence on claims of trusts over land is well established in a line of court decisions, including the Supreme Court of Kenya decision of *Kiebia v M'lintari & another* [2018] KESC 22 (KLR) and *Diasproperty Limited* (Supra). In conclusion, this court finds it has jurisdiction to handle the dispute.



19. In the end, the notice of motion dated 25/09/2024 is hereby dismissed, and since it is trite law that costs follow the event, costs are awarded to the plaintiffs. This matter shall be mentioned for a case conference.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 10TH DAY OF JUNE, 2025.

HON. A. Y. KOROSS

JUDGE

06.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Musyimi for plaintiff

M/s Nyambura holding brief for Mr. Ochieng for defendant/applicant.

Ms Kanja- Court Assistant

